

EX PARTE OR LATE FILED

PIPER & MARBURY

L.L.P.

1200 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036-2430

WRITER'S DIRECT NUMBER
(202) 861-6471
FAX: (202) 861-4160
Moconnor@pipermar.com

202-861-3900
FAX: 202-223-2085

BALTIMORE
NEW YORK
PHILADELPHIA
EASTON

January 25, 1999

RECEIVED

JAN 25 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

HAND DELIVERY

Ari Fitzgerald, Esq.
Office of Chairman William E. Kennard
Federal Communications Commission
The Portals
445 12th Street, S.W.
Room # 8-B201
Washington, D.C. 20554

Re: Ex Parte Presentation
WT Docket No. 97-87

Dear Mr. Fitzgerald:

This letter is to address more fully an issue that was raised in our January 21 meeting. Specifically, the issue is to confirm that the Commission's unjust enrichment rule does not apply to a post-auction assignment of a Block C or F license where the assignee is an existing Block C licensee, qualified at the time of the initial Block C auction as a "small business," or a Block F licensee, qualified at the time of the initial Block F auction as a "very small business." As described below, we strongly believe that the unjust enrichment rule would not apply to such an assignment.

The Commission addressed this factual situation directly at ¶ 126 of the Fifth Memorandum Opinion and Order:

"... we clarify that ... we will allow licensees to transfer a [Block C or F] license to any entity that either holds other entrepreneurs' block licenses (and thus at the time of the auction satisfied the entrepreneurs' block criteria) or that

Ari Fitzgerald, Esq.
January 25, 1999
Page 2

satisfies the criteria at the time of transfer. *Unjust enrichment penalties (as described above) apply if these requirements are not met . . .*”¹

Thus, where the requirements *are met* – the assignee holds Block C or F licenses at the time of assignment and qualified in the auction in which it obtained the license(s) as a “small business” or “very small business,” respectively – the unjust enrichment penalty *does not apply*.

The Commission’s subsequent decisions on this issue have reaffirmed, without modification, the Commission’s decision in the Fifth Memorandum Opinion and Order. For example, in 1996, when it relaxed the Block C and F anti-trafficking restriction to permit transfers/assignments among entrepreneurs during the first five years of the license term, the Commission specifically noted that: “our unjust enrichment rules will continue to apply as before.”² In 1997, when it reformed the Part 1 unjust enrichment rule, the Commission emphasized that it was “conform[ing] our Part 1 unjust enrichment rules to the broadband PCS rules.”³

Indeed, the language of the current unjust enrichment rule, 47 C.F.R. § 1.2111(d)(1), is broad enough to allow for this interpretation. Under the rule, an unjust enrichment penalty is assessed where “a licensee that utilizes a bidding credit seeks to assign or transfer control of a license to an entity that is eligible for a lower bidding credit

¹ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Memorandum Opinion and Order, 10 FCC Rcd. 403, 468 (1994) (emphasis added).

² *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, 11 FCC Rcd. 7824, 7864 (¶ 85) (1996).

³ *Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd. 374, 406 (¶ 52) (1997). See also *id.* at 378 (¶3) (Part 1 unjust enrichment rule is modified for licensees “who seek to transfer or assign their licenses . . . to conform with the broadband PCS rules”).

Ari Fitzgerald, Esq.
January 25, 1999
Page 3

...“ But, the determination of the “bidding credit” for which the assignee is “eligible” cannot be made relying only on the language of the rule. Guidance on that issue must come from other Commission pronouncements. This is precisely why the Commission felt compelled to “clarify” in the Fifth Memorandum Opinion and Order that the assignee’s eligibility *relates back* to “the time of the auction” in which the assignee obtained its Block C or F licenses. This conclusion is buttressed by the historical evolution of the specific rule language used in Section 1.2111(d). As noted above, the 1997 modifications to the Part 1 rule relied on the prior Part 24 rule (formerly, 47 C.F.R. § 24.712(d)(2)), which was first adopted in the 1994 Fifth Report and Order.⁴ That rule, as adopted in 1994, used language that is virtually identical to the language of the current Section 1.2111(d)(1).⁵ The adoption of the Fifth Memorandum Opinion and Order, later in 1994, deliberately “clarified” that, in the fact situation presented here, the rule would not impose an unjust enrichment penalty. It would be unreasonable for the Commission to interpret the same unjust enrichment language to reach any other conclusion than the one articulated in the Fifth Memorandum Opinion and Order,⁶ especially where parties have substantially relied on that rule for several years.

Please feel free to contact us if you want to further discuss these issues. In

4 *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd. 5532 (1994).

5 *Compare id.*, at 5643 (text of former rule Section 24.712(d)(2)), *with*, 47 C.F.R. § 1.2111(d)(1).

6 Moreover, since the Commission in the Fifth Memorandum Opinion and Order could have modified the language of 47 C.F.R. § 24.712(d), but chose instead to “clarify” the rule, it is apparent that the Commission concluded that the “clarification” was within the existing meaning of the rule and it needed no modification.

Ari Fitzgerald, Esq.
January 25, 1999
Page 4

accordance with the Commission's ex parte rules, two copies of this letter will be submitted today to the Commission's Secretary's office.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark J. O'Connor". The signature is fluid and cursive, with the first name "Mark" and last name "O'Connor" clearly distinguishable.

Mark J. Tauber
Mark J. O'Connor
Counsel for Omnipoint Corporation

cc: Douglas Smith
Peter Tenhula, Esq.
Amy Zoslov, Esq.